

Whether such a requirement would be imposed would depend on whether a separate and independent claim for “expenses to reinstate” were imposed against the Slamming Carrier⁹⁷ or whether such expenses were to be recovered from the surplusage. While returning the funds to the subscriber and independently collecting expenses from the Slamming Carrier seems the most equitable and also most exactly puts the paying subscriber and non-paying subscriber on equal footing, it is also the most cumbersome administratively. To the extent the Original Carrier does have reinstatement expenses, those can easily be recouped through the surplusage; a separate claim would require separate processing and, perhaps, an adjudication for collection.

With respect to the non-paying subscriber, the Commission should reject any proposal that a subscriber using the network of the Slamming Carrier should be absolved of any payment obligation to any carrier. Such is contrary not only to the Congressional intent made obvious by Section 258(b)⁹⁸ but would operate as an invitation for fraud.⁹⁹ At a minimum, the subscriber should be required to pay

premiums. Section 64.1170(c). Thus, it is unclear precisely what the Commission is proposing by way of its reimbursement discussion.

⁹⁷ 47 U.S.C. § 258(b).

⁹⁸ The type of absolution requested by the National Association of Attorneys General (“NAAG”) in its Motion for Reconsideration filed Aug. 11, 1995 (“NAAG PFR”) with respect to the 1995 Report and Order, is not consistent with the new Congressional remedy in Section 258(b). Whatever might have been the sustainability of that position before the passage of that provision, it is inappropriate at this time. Its realization would leave the Original Carrier with no compensation, a situation obviously contrary to Congressional intent.

⁹⁹ NPRM ¶ 27. The NAAG argued, in its prior PFR, that it was “unlikely that any great number of consumers will become sufficiently acquainted with FCC regulation

the Original Carrier what the Original Carrier would have charged the subscriber. (This is the essence of the Commission's prior compensation rules, with the change in approach that the payment would go directly to the Original Carrier, rather than to the Slamming Carrier.) In this situation, however, there will be no immediate "surplusage" from which the Original Carrier can recoup its administrative expenses. Thus, either the Slamming Carrier should be required to pay to the Original Carrier the amount the Slamming Carrier would have received from the subscriber had the subscriber paid, over and above what the Original Carrier charged, to cover reinstatement expenses (something like a "liquidated reinstatement fee"), or a separate claim by the Original Carrier against the Slamming Carrier would be necessary.

While the Commission is correct that the literal language of Section 258(b) applies only in those instances where a Slamming Carrier collects money from a user of its service, we do not read Congress' language as expressing an intent to absolve subscribers of any responsibility to pay any carrier for service. To read such an intention into Section 258(b) would be to assume that Congress meant to "reward" those network users who -- through careful perusal of the bill, through serendipity, or through "slow-pay" habits -- had not yet paid their bill and to "penalize" those subscribers who paid the bill on time (and maybe with less than

to take the Byzantine step posed" by those opposing absolution of payment, *i.e.*, publication of the ability to secure free service. NAAG PFR at 8. The NAAG is clearly incorrect. Such an "absolution scheme" would be on the Internet in a matter of minutes after the Commission issued regulations creating such an absolution policy. At that point, wrong-doing consumers would begin to take advantage of it immediately.

careful review). No such intention can be found in Section 258. Rather, the remedy was probably written based on the assumption that the bill would have been paid already and with little thought to what might be an appropriate remedy had it not been paid. But, the failure to identify specifically absolution of payment as a remedy strongly argues against it being Congressionally endorsed, at least at this time.

Nor would the problems associated with an absolution of payment be resolved by establishing a “time certain” for such absolution.¹⁰⁰ This simply rewards the non-paying subscriber and operates as a surrogate for absolution from payment.

The Commission can easily modify its proposed rules to address the matter of a subscriber who fails to pay a Slamming Carrier. In those instances where a subscriber discovers he/she was slammed before payment has been made, payment should be made to the Original Carrier of what would have been the charge for the call under the Original Carrier’s charging plan. The Slamming Carrier should then either pay the Original Carrier the “surcharge” it would have collected from the subscriber had the subscriber paid the Slamming Carrier in the first instance, or the Original Carrier should have a separate claim for expenses.

B. Carrier-To-Carrier Liability For Expenses, Bonuses, Premiums, Etc.

As the Commission observes, in addition to the actual charges paid by a subscriber to a Slamming Carrier, that Slamming Carrier should be required to

¹⁰⁰ NPRM n.84.

cover not just the Original Carrier's foregone revenues,¹⁰¹ but the administrative expenses incurred in reinstating the consumer to service and making the appropriate adjustments and restorations associated with premiums and calling plans.¹⁰²

To the extent that the payment of toll traffic charges themselves are insufficient to cover the reasonable value of the premiums, bonuses, etc., (which might be the case if the subscriber has paid nothing to the Slamming Carrier) or to any material degree (which might be the case if the value of the premiums is in excess of the charges paid to the Slamming Carrier), the Original Carrier obviously would be able to pursue either a complaint before the Commission against the Slamming Carrier or could proceed with a court action for monies due and owing.

C. Standard Of Liability For Commission Rule Violations

The Commission's adoption of a "but for" test for carrier liability¹⁰³ is inappropriate for all carriers, but particularly for Executing Carriers. It creates an unwarranted strict liability where there is no evidence that Congress meant to impose such liability. Congress expressed an opinion only that those carriers that do violate the Commission's rules and regulations regarding the submission and execution of PC change orders be subject to the remedy outlined in Section 258(b). Over and above the absence of any Congressional intent to impose strict liability on any carrier, there is nothing in Section 258(b) to suggest that the Commission -- in

¹⁰¹ Id. and n.83.

¹⁰² Id. at n.90.

¹⁰³ Id. ¶¶ 33-34.

prescribing rules under Section 258(a) -- should change existing Executing Carrier

liability (which is generally reflected in tariffs), since the remedy in Section 258(b) has no application to an Executing Carrier's participation in the PC change process.

Section 258(a) allows the Commission to craft rules and regulations around the matter of PC changes. It does not require the Commission to adopt regulations that render a carrier strictly liable for any act or omission -- however unintentional. The remedy outlined in Section 258(b) becomes operational only when there is a violation of the Commission's verification rules, whenever that may be. The Commission should not adopt rules that can be "violated" in the absence of at least negligent conduct.¹⁰⁴ The Commission should prescribe PC change and verification rules that affect only conduct that is, at a minimum, negligent, or, more appropriately, grossly negligent or intentional.

Assuming, however, that the Commission deems it appropriate to impose strict liability in every circumstance of an unauthorized conversion of a subscriber's carrier, so as to invoke the relief provisions of Section 258(b), that construction should apply only to Submitting Carriers. Given that no charges or revenues inure to the benefit of Executing Carriers, they should have no liability for errors in PC

¹⁰⁴ Thus, the language of proposed Rule 64.1160(a)(1) should be changed to reflect some scantier requirement for the Submitting Carrier, since such a requirement is already reflected for an Executing Carrier ("wrongdoing or malfeasance"). The revised Rule might read: "Where the submitting carrier **either negligently or knowingly** submits a verification . . ."

change orders, absent gross negligence.¹⁰⁵ Nor should they be required to submit to dispute resolutions over every error. It is precisely to preclude such constant *ad hoc* dispute resolution procedures that Executing Carriers (*i.e.*, LECs) have tariffed their PC change processes, which are subject to their standard limitations of liability.¹⁰⁶

¹⁰⁵ NPRM ¶ 34 (suggesting that where a Submitting Carrier submits an appropriate PC change and an Executing Carrier fails to execute the change correctly, the Executing Carrier would be liable). And see proposed Rule 64.1160(a)(2). The Commission does not expand on this factual situation, which could easily cover a number of different fact patterns. For example, a submitting carrier might submit a change for billed telephone number 303-555-1147, and the executing carrier might hit an incorrect key and change the customer from Carrier X to Carrier Y (rather than to the Submitting Carrier Z). In this situation, Submitting Carrier Z has not received funds that it should have and Carrier Y inappropriately received funds. **But, in no instance did the Executing Carrier receive any funds.**

Similarly, a Submitting Carrier might submit a change for the above billed telephone number and the Executing Carrier might type the number as 303-455-1147. In this situation, theoretically at least two errors have occurred, and -- with respect to at least one -- there was no Submitting Carrier. The billed telephone number submitted did not get changed, and another customer's number was changed although there was no submission. Here, the Original Carrier assigned to the submitted billed telephone number received revenue that was meant to go to a new, different carrier (the Submitting Carrier). And, the converted billed telephone number potentially would render money to a carrier that did not submit a change request, and the converted telephone number's Original Carrier would be deprived of the revenue. **But, again, the Executing Carrier would have received no revenue.**

¹⁰⁶ Gross negligence is the traditional standard of conduct included in LEC tariff language as being required for the imposition of liability. Such tariff language has been upheld by the courts and the Commission. See, e.g., In the Matter of Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., Inc., Order, 10 FCC Rcd. 13639, 13641 ¶ 12 "[T]he filed tariff doctrine requires the enforcement of tariff terms and conditions other than rates, and applies those terms in tort actions as well as in contracts. More recent precedent similarly holds that a filed tariff applies to all tariff provisions, not just to those pertaining to rates." Id. n.51 citing to Western Union Tel. Co. v. Priester, 276 U.S. 571 (1921) and Western Union Tel. Co. v. Priester, 276 U.S. 252, 259 (1928). These cases have been cited by numerous courts supporting the enforcement of tariff provisions limiting liability. This

The only meaningful participants to the Section 258(b) remedy are the carriers providing the network services -- not the Executing Carrier. It is only the former that have "charges" for service either billed or remitted. It is only the former that can transfer the monies associated with those charges to another carrier.¹⁰⁷

It does not appear from the language of Section 258 that Congress anticipated that an Executing Carrier, operating in no more than a ministerial capacity, would be liable for anything to anyone. Furthermore, an Executing Carrier will often have no relation to the customer at all and will be collecting no money. Thus, it seems entirely inappropriate for such carrier to be "liable" to anyone. The Commission should prescribe verification rules that make clear that in the absence of gross negligence an Executing Carrier is not liable for PC changes made in error.¹⁰⁸

A PC change conversion error made by an Executing Carrier will, however, impact two other carriers. In such a situation, both network providers (the Original Carrier and the Receiving Carrier) are also innocent of any misconduct. Thus, the remedy provided in Section 258(b) might not be the appropriate remedy.¹⁰⁹

language seems all the more appropriate since PIC change processing is a subject matter of many carriers' tariffs. See U S WEST Communications Tariff F.C.C. No. 5 § 2.1.3(C)(2).

¹⁰⁷ Indeed, the Commission's proposed Rule 64.1160(a)(3), which replicates the language of Section 258(b), makes no provision for Executing Carrier liability.

¹⁰⁸ Compare NPRM at n.47 ("Because the submitting carrier, not the executing carrier, is guilty of slamming in most instances . . .").

¹⁰⁹ The Commission's proposed Rule 64.1160(a)(3) ignores the fact that not only the Submitting Carrier might be involved in an erroneous processing of a PC change.

The Commission might determine that a remedy more appropriate than Section 258(b) is to apply its prior rule with respect to the liability of the two non-Submitting Carriers.¹¹⁰ The Receiving Carrier which secured the subscriber as a result of an Executing Carrier's error could charge the subscriber no more than the Original Carrier would have charged.¹¹¹ Should some additional extraction be necessary to accommodate the innocent network providers, an Executing Carrier's liability should be -- at most, in the absence of gross negligence -- limited to a preclusion from charging either carrier to correct for the error.

With respect to Executing Carrier actions independent of a ministerial function, such as intentionally delaying the processing of submitting carriers' PC orders or intentionally changing customer designations, such actions can be

Indeed, there may not even be a Submitting Carrier, as pointed out in note 104 supra.

¹¹⁰ The Commission has noted the connection between the remedy outlined in Section 258(b) and an "offending" Submitting Carrier. NPRM ¶ 9 ("Section 258 has added an economic disincentive for carriers to slam because it requires an unauthorized carrier that violates our verification procedures to pay the charges it collects from a slammed consumer to the properly authorized carrier. Carriers that violate our verification procedures will be required to forfeit revenues they have heretofore been able to keep." (footnotes omitted, emphasis added)). Clearly, a carrier which does nothing and yet is affected by an Executing Carrier error will not have violated the Commission's verification rules.

¹¹¹ See 1995 Report and Order, 10 FCC Rcd. at 9579.

addressed satisfactorily through either a Section 208 complaint proceeding or a formal prosecution for intentional misrepresentation of facts.

Respectfully submitted,

U S WEST, INC.

By: Kathryn Marie Krause
Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
303-672-2859

Its Attorney

Of Counsel,
Dan L. Poole

September 15, 1997

ATTACHMENT

US WEST CUSTOMER ALERT
LONG-DISTANCE SLAMMING CALL

(Transcript of actual attempted slam, obtained from customer with their permission)

Customer: Who is this?

Slammer#1 (posing as U S WEST): How are you doing, this is US WEST customer service...

Customer: Uh-huh...

Slammer#1: ...May I speak with the person in regards to that telephone account there, ma'am?

Customer: He is not in.

Slammer#1: Uh, okay.

Customer: Is there a message?

Slammer#1: Um, you don't handle that bill at all?

Customer: No.

Slammer#1: Okay, you're sure?

Customer: Am I sure?

Slammer#1: Yeah.

Customer: Right.

Slammer#1: Okay. You are an employee there?

Customer: Well, I'm his wife actually. He takes care of his bills.

Slammer#1: Oh.

Customer: What did you need?

Slammer#1: Okay. Well, this has to do with the combined billing, and if you are a family member, that would go ahead and make you authorized. This basically is just a courtesy call, in regards to that consolidated billing notice that you received in your US WEST statement. Basically just to notify you that due to a new billing procedure, all your long distance charges are going to go right on that US WEST phone account...

Customer: Now who's calling again?

Slammer#1: This is US WEST Customer Service, ma'am.

Customer: You are with US WEST.

Slammer#1: Yes. This is basically just a notification call, pretty sure you remember the memo about three years ago, I got your main billing telephone number there 425-****. Do you have any roll-over lines or fax lines there?

Customer: No.

Slammer#1: Just that one line?

SEP 15 '97 12:59PM US WEST

Customer: Right. Now, you're not changing anything.

Slammer#1: Okay. No. No, this is just the combined billing. I'm not real sure if you can remember the way about three years ago, when we had it all combined on that US WEST bill...

Customer: Uh. I'd rather have you talk to him. see he's home in the evenings, actually, only.

Slammer#1: Okay...

Customer: Because...

Slammer#1: This isn't a router notice, this is a notification notice.

Customer: Uh-huh.

Slammer#1: So what we're going to do, it's just...it's a free service, and there's no obligation on it, if you want we could go ahead and take care of it today...

Customer: Well, I'd rather have you...

Slammer#1: What is the number there...

Customer: Yeah, I'd rather have you not...

Slammer#1: ...a residence...

Customer: No, don't take care of it today.

Slammer#1: ...that still in Kelso?

Customer: Yeah, don't take care of it today. I'd rather have you talk to my husband.

Slammer#1: Okay, you want me to have him...All right. Well, can you transfer me?

Customer: Well, he's not even available until tonight.

Slammer#1: He's not...

Customer: Right, no.

Slammer#2 (posing as husband on other line): Hello?

Slammer#1: Hello, Sir?

Slammer#2: Yeah.

Slammer#1: Oh, okay. Okay, you can go ahead and cut off the line ma'am, I've got him. We're going to go ahead and change out...

Slammer#2: I've got it honey.

Customer: Don't...Hold it, hold it hold it.

Slammer#2: I've got it, honey.

Customer: Don't change anything.

Slammer#1: Okay, no it's just...if I LDC...

Slammer#2: Honey, I've got it. I got it. Honey...

Slammer#1: We're just going to go ahead and get it taken care of for you, okay?

Customer: No, no-no-no-no. Don't change anything.

Slammer#2: I don't want to change...

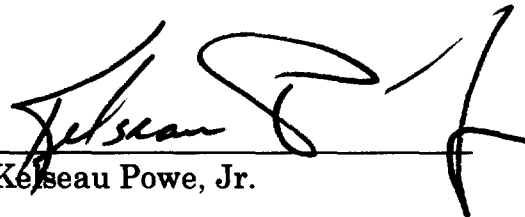
Customer: Hangs up.

Slammer#1: Hello? Yeah, ma'am? Well, s*** man.

SEP 15 '97 12:59PM US WEST

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 15th day of September, 1997, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC. TO NOTICE OF PROPOSED RULE MAKING AND PETITION FOR RECONSIDERATION OF MEMORANDUM OPINION AND ORDER ON RECONSIDERATION*** to be served, via hand delivery, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

*Pursuant to the July 15, 1997 Further Notice of Proposed Rule Making (FCC-97-248), paragraph 111, an electronic version of this filing is submitted to the Office of the Secretary (and Cathy Seidel of the CCB), on a 3x5 inch diskette, along with a cover letter.

Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

Susan P. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

Chief, Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

Cathy Seidel
Federal Communications Commission
Room 6120
2025 M Street, N.W.
Washington, DC 20554

(Including a 3x5 diskette w/cover letter)

Diane Harmon
Federal Communications Commission
Room 6310
2025 M Street, N.W.
Washington, DC 20554

Formal Complaint Branch
Federal Communications Commission
Mail Stop 1600A1
Washington, DC 20554

(2 Copies)

International Transcription
Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036